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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CASSIUS CLAYTON WHITEHEAD, Appellant.	)	2 CA-CR 2009-0110 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071940

Honorable Howard Hantman, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst
Tucson
Attorneys for Appellee

Cassius C. Whitehead
Douglas
In Propria Persona

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Cassius Whitehead was found guilty of multiple counts of armed robbery, kidnapping, aggravated assault and attempted first-degree murder of a law enforcement officer. He was sentenced to concurrent and consecutive,

aggravated and substantially aggravated prison terms totaling 118 years. On appeal, Whitehead argues the trial court erred by denying several of his motions and by admitting tainted identification evidence. Because the trial court did not err or abuse its discretion, we affirm.

Factual and Procedural Background

¶2 We view the evidence and all permissible inferences arising from the evidence in the light most favorable to sustaining the verdict. *See State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). Whitehead entered a bank wearing a ski mask and gloves. He pointed a gun at bank employees and ordered them to give him cash from the bank vault and cash drawers. Some of these items included tracking devices. A key from the bank also fell in the bag. Whitehead left the bank in a car that police officers found abandoned about ten minutes later.

¶3 Using the tracking system from the bank, officers found Whitehead riding a bicycle away from where a car matching the description of the one driven by the bank robber was parked. The officers saw Whitehead get off the bicycle, pull a gun from his bag and jump over a wall into a residential area. Soon after, he began firing at the officers, injuring two of them. Whitehead then began running away, and an officer shot him, stopping him. Officers took Whitehead into custody, and he was convicted and sentenced, as stated above. This appeal followed.

Motion for Substitute Counsel

¶4 Whitehead argues the trial court erred by denying his request for substitute counsel because his relationship with defense counsel was "completely fractured" and

there was "a total breakdown in communication." His motion below was actually a request for self-representation, which the court granted. But, because the request was based on the court's refusal to provide substitute counsel, we will address the issue as a request for substitute counsel. We review the denial of a request for substitute counsel for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 8, 154 P.3d 1046, 1050 (App. 2007).

¶5 The Sixth Amendment to the United States Constitution entitles a criminal defendant to competent representation but not to "counsel of choice" or "a meaningful relationship" with counsel. *State v. Cromwell*, 211 Ariz. 181, ¶ 28, 119 P.3d 448, 453 (2005). In deciding whether to grant a motion for substitute counsel, a trial court must consider the following factors: "'whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; [and] the proclivity of the defendant to change counsel.'" *State v. Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d 578, 580 (1998), *quoting State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). A defendant's loss of trust in counsel alone does not require the trial court to appoint new counsel. *Paris-Sheldon*, 214 Ariz. 500, ¶ 14, 154 P.3d at 1051. It is only where there is a "'complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel, that defendant's Sixth Amendment right to counsel has been violated.'" *Id.* ¶¶ 12, 14, *quoting State v. Torres*, 208 Ariz. 340, ¶ 6, 93 P.3d

1056, 1058 (2004). The defendant has the burden of demonstrating an irreconcilable conflict or breakdown in communication. *Torres*, 208 Ariz. 340, ¶ 8, 93 P.3d at 1059.

¶6 The trial court first appointed Barry Baker-Sipe to represent Whitehead. Five weeks before trial, Whitehead requested substitute counsel, citing irreconcilable differences with Baker-Sipe. The court granted Whitehead's motion for substitute counsel and extended the trial date, but warned Whitehead that new counsel would "be the last attorney."

¶7 Ten weeks before his new trial date Whitehead submitted a motion "invok[ing] his right to self-representation." At the hearing Whitehead asserted that his new counsel, Kyle Ipson, had not provided him with adequate representation, maintaining Ipson had not communicated meaningfully with him and that Ipson had failed to interview defense witnesses, investigate other evidence and file motions. Whitehead explained that because the trial court had told him he could not have another substitution of counsel he had decided to represent himself. The court granted Whitehead's motion, allowing him to represent himself with Ipson remaining as advisory counsel. Later, prior to trial, Whitehead asked that Ipson again represent him. The court granted his request.

¶8 Because Whitehead ultimately requested that Ipson represent him at trial, he has waived any issue concerning the representation after that point.[1] *See State v.*

[1]Although Whitehead generally requests we review for fundamental error, the defendant has the burden of showing any error was fundamental and prejudiced him. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Because Whitehead has not demonstrated fundamental error, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived on appeal); *State v.*

Lamar, 205 Ariz. 431, ¶¶ 23-24, 72 P.3d 831, 836 (2003) (decision to continue with appointed counsel withdrawal of request for self-representation); *cf. State v. Cruz*, 218 Ariz. 149, ¶ 105, 181 P.3d 196, 213 (2008) (withdrawn objection waived). And Whitehead has not demonstrated that the events occurring between the trial court's denial of substitute counsel and his request that Ipson represent him deprived him of his right to counsel. Thus, Whitehead has failed to show he was prejudiced by the court's denial of his request. *See State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998) ("Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict.").

¶9 Moreover, even if we address the merits of his complaint, his claim fails. At the time of the hearing, Ipson had met with Whitehead three times, once briefly, once for an hour and once for three hours. Whitehead's complaints about Ipson's failure to interview witnesses, investigate the case and file motions concern either counsel's competence or his diligence in preparation for trial. But because ineffective assistance of counsel may be raised only in a petition for post-conviction relief, we will not consider the quality of counsel's representation here. *See State v. Torres*, 208 Ariz. 340, ¶¶ 15, 17, 93 P.3d 1056, 1060-61 (2004); *see also State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32[, Ariz. R. Crim. P.], proceedings" and "will not be addressed by appellate courts" if brought on direct appeal.). And Whitehead provided the trial court with no evidence that

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Fernandez, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

the two months remaining before trial would not be sufficient for Ipson to finish interviewing witnesses, investigate and file motions or that Ipson had refused to do so. We cannot find that any conflict could not have been reconciled by Ipson's actions in the time leading up to trial. Additionally, the perceived problems Whitehead alleged did not amount to a complete breakdown in communication or an irreconcilable conflict. Instead, it merely appears that Whitehead would have preferred other counsel. *See Cromwell*, 211 Ariz. 181, ¶ 28, 119 P.3d at 453.

¶10 Furthermore, Whitehead wanted to replace Ipson for reasons very similar to the ones he previously gave for replacing Baker-Sipe. And Whitehead provides no evidence that the same conflicts would not have arisen with another substitution of counsel. Thus, the trial court did not abuse its discretion in denying Whitehead's second motion for substitute counsel. *See Moody*, 192 Ariz. 505, ¶ 11, 968 P.2d at 580.

Sufficiency of Evidence

¶11 Whitehead further contends the trial court erred by denying his motion for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., because there was not substantial evidence identifying him as the person who had committed the offenses at the bank. "We conduct a de novo review of the trial court's decision, viewing the evidence in a light most favorable to sustaining the verdict." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993); *see also State v. West*, 226 Ariz. 559, ¶¶ 14-16, 250 P.3d 1188, 1191 (2011).

¶12 A judgment of acquittal should be granted only when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also State v.*

Mathers, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). On appeal, we will not set aside the verdict unless it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). Evidence may be sufficient to support a conviction if it is direct or circumstantial, *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005), and courts do not distinguish between the two, *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence.").

¶13 The robber at the bank took tracking devices and marked bills with the money in a black duffel bag. Whitehead was found on his bicycle with a black duffel bag containing the tracking device, and he left the black duffel bag in a yard just before he was shot. The duffel bag contained the money, tracking devices and a key from the bank. The description of the robber's gun also matched a gun in another bag left by Whitehead.

¶14 The robber at the bank left a footprint on a counter, which a footwear examiner compared to the tread on Whitehead's shoes. The examiner concluded the shoe print in the bank had a similar tread pattern to Whitehead's shoes, and he could not exclude Whitehead's shoes from having made the print. Whitehead also matched the description of the robber's height, build, facial hair, and complexion. Witnesses reported the robber at the bank had been wearing black clothing with a white collared shirt

underneath, as well as a black ski mask and dark gloves. Whitehead was found wearing a white collared shirt and had a black ski mask in his bag. Furthermore, Whitehead's DNA could not be excluded from the mixture of DNA found on the steering wheel of the car the robber had driven. Based on the quantum of direct and circumstantial evidence, the trial court did not err in finding substantial evidence supported Whitehead's convictions for the offenses committed at the bank. *See Jones*, 125 Ariz. at 419, 610 P.2d at 53.

Peremptory Strike

¶15 Whitehead next argues the trial court erred by denying his *Batson*[2] challenge to the prosecutor's strike of potential juror, L. Whitehead contends the prosecutor improperly struck L. from the jury on the basis of race or religion. When reviewing the court's ruling on a *Batson* challenge, we defer to its factual findings, but we review de novo its application of the law. *State v. Lucas*, 199 Ariz. 366, ¶ 6, 18 P.3d 160, 162 (App. 2001). We will not reverse a trial court's ruling on a *Batson* challenge unless it is clearly erroneous. *State v. Newell*, 212 Ariz. 389, ¶ 52, 132 P.3d 833, 844-45 (2006).

¶16 A party may not exercise a peremptory strike on the basis of race or religious affiliation.[3] *State v. Purcell*, 199 Ariz. 319, ¶¶ 22, 29, 18 P.3d 113, 119, 122 (2001). There are three steps involved in a *Batson* challenge: 1) the opponent of the

[2]*Batson v. Kentucky*, 476 U.S. 79 (1986).

[3]Although Whitehead also argues a violation of the Arizona Constitution, in this area "the protections under our state constitution are no greater than those provided for under the federal constitution." *State v. Lucas*, 199 Ariz. 366, ¶ 5, 18 P.3d 160, 161 (App. 2001).

strike must make a prima facie showing of discrimination; 2) the proponent must give a neutral reason for the strike; and 3) the trial court must evaluate whether the opponent has established discrimination on a prohibited ground. *Id.* ¶ 23. The neutral reason required at the second step "need not be 'persuasive or even plausible, only legitimate.'" *Id.*, *quoting Purkett v. Elem*, 514 U.S. 765, 768-69 (1995). However, even if the proponent of the strike offers nondiscriminatory reasons, the inclusion of a single discriminatory reason will establish a *Batson* violation. *Lucas*, 199 Ariz. 366, ¶¶ 11-12, 18 P.3d at 163.

¶17 Although a party may not strike a juror on the basis of religious affiliation, a strike on the basis of religious opinion is permissible. *Purcell*, 199 Ariz. 319, ¶ 29, 18 P.3d at 122. The Arizona Supreme Court has upheld the strike of a pastor on the ground that his occupation made him forgiving, analogizing it to the strike of a social worker for the same reason. *State v. Martinez*, 196 Ariz. 451, ¶¶ 14-15, 999 P.2d 795, 800 (2000). And this court considered the strike of a juror because she opposed the death penalty because of her beliefs as a Catholic and because she worked for the Catholic Church, which opposed the death penalty. *Purcell*, 199 Ariz. 319, ¶¶ 18, 31, 18 P.3d at 118, 122. The *Purcell* court held that the prosecutor properly could consider the juror's beliefs regarding the death penalty and the opinions held by her employer as a basis to strike her even if her "religious views were intertwined with these other [permissible] factors." *Id.* ¶ 31.

¶18 Whitehead objected to the prosecution's strike of L., an African-American woman, based on race. The trial court did not determine whether or not Whitehead had established a prima facie case of race discrimination. The prosecutor explained he had

struck L. because she had not responded to the question whether anyone had worked in social work but later had revealed that she worked with juvenile criminal offenders in their "last chance" before incarceration. Additionally, he said her position as a social worker showed she might be sympathetic toward the defendant. The prosecutor also stated he struck L. because her brother was in prison and she had an unprosecuted rape in her background. Finally, he explained L.'s shirt which read "Christ for Life" seemed confrontational especially in light of her staring at the prosecutor frequently. Whitehead did not respond and the court found there had been no *Batson* violation. The record also reflects that the prosecutor did not strike K., an African-American man, from the jury.

¶19 Although not dispositive, that the prosecutor did not strike K. from the jury suggests a nondiscriminatory motive. *See State v. Cañez*, 202 Ariz. 133, ¶ 23, 42 P.3d 564, 577 (2002). And the prosecutor offered various permissible race-neutral reasons for striking L. *See id.* ¶¶ 18, 28 ("concern regarding candor" race-neutral); *Martinez*, 196 Ariz. 451, ¶ 15, 999 P.2d at 800 (striking social worker because forgiving would be permissible). The trial court did not abuse its discretion in finding the strike was not racially discriminatory. *See Purcell*, 199 Ariz. 319, ¶¶ 22, 29, 18 P.3d at 119, 121-22.

¶20 Although Whitehead also argues on appeal that the state struck L. on the basis of religious affiliation, he did not object on that basis in the trial court, even when the court mentioned religious beliefs. And Whitehead's objection on the basis of race does not preserve the issue for appeal on the basis of religion. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008).

¶21 Moreover, even if Whitehead had preserved this issue for appeal, the state did not impermissibly strike L. on the basis of religious affiliation. If the state had struck L. from the jury because of any consideration of her religious affiliation, the strike would have been invalid. *See Lucas*, 199 Ariz. 366, ¶¶ 11-12, 18 P.3d at 163. But, the prosecutor explained that he struck L. because she was the only juror wearing a shirt stating her "religious beliefs or polic[y] beliefs," and he found that to be "confrontational." If the state had struck L. for wearing a shirt displaying a belief of a non-religious nature because it believed showing that opinion so overtly was confrontational, the strike would have been valid. Thus, even though the belief displayed on L.'s shirt was religious, the state did not impermissibly strike her on the basis of her religious affiliation, but rather because it found the open display of opinion to be confrontational. *Cf. Martinez*, 196 Ariz. 451, ¶ 15, 999 P.2d at 800.

¶22 Whitehead suggests that because the prosecutor did not strike a juror who made a delayed response and another who had a son who was incarcerated, it shows the strike of L. was because of her race or religious affiliation. However, he does not show that the other jurors who remained on the jury had the same combination of the many reasons for which the prosecutor struck L. Thus, this comparison does not show that the prosecutor's reasons were not legitimate. *See Purcell*, 199 Ariz. 319, ¶ 23, 18 P.3d at 119. The trial court did not abuse its discretion in denying Whitehead's *Batson* challenge.

Witness Interviews

¶23 Whitehead contends the trial court erred in denying his motions for second interviews with certain state witnesses, alleging it "violated his due process, compulsory process and right to present a defense." We review a discovery request for an abuse of discretion but review a claim of a constitutional violation de novo. *State v. Conner*, 215 Ariz. 553, ¶ 6, 161 P.3d 596, 600 (App. 2007).

¶24 Under Rule 15.3(a)(2), Ariz. R. Crim. P., a trial court may order an interview when "[a] party shows that the person's testimony is material to the case or necessary adequately to prepare a defense or investigate the offense . . . ." On appeal, Whitehead provides no evidence that the individuals he wished to interview a second time would have provided testimony necessary to prepare his defense or investigate the offense which could not have been discovered during the original interview. He also fails to cite any cases giving a defendant the right to have a second interview with a witness. The trial court did not err in denying Whitehead's motion. *See Conner*, 215 Ariz. 553, ¶ 6, 161 P.3d at 600.

¶25 Whitehead specifically alleges a "Mendez-Rodriguez violation" and relies on cases discussing *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9th Cir. 1971), in support of this argument. *Mendez-Rodriguez* concerned a defendant's opportunity to interview witnesses who had been deported, which is not the case here. 450 F.2d at 2. Moreover, *Mendez-Rodriguez* has been abrogated such that even where witnesses have been deported, a defendant must show their testimony would have been "both material

and favorable to the defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982). Whitehead has failed to meet this standard, even if it applies.

Pretrial Identification

¶26 Whitehead finally argues the trial court abused its discretion by permitting a detective to identify him based on a photograph of him from the day of the offense that the detective was shown a few days before testifying. Whitehead did not object at the time of the detective's testimony, instead raising the issue in a motion for a new trial.

¶27 "[A]n untimely objection first raised in a motion for a new trial does not preserve an issue for appeal." *State v. Davis*, 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010). Whitehead therefore has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Whitehead states generally that "out of an abundance of caution [he] contends that fundamental error occurred within the context of each of the five arguments above and therefore he requests fundamental error analysis." But, the defendant has the burden to show both that the error was fundamental and that it caused him prejudice. *Id.* Because Whitehead provides no more than a conclusory statement alleging fundamental error, he has not met the burden of showing either that any error was fundamental or prejudicial. *See id.*

Conclusion

¶28 For the foregoing reasons, we affirm Whitehead's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge